STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Court of Appeals
No. 151439

PHILLIP JOSEPH SWIFT,
Defendant-Appellant.

Third Circuit Court No. 13-005130-FC
Court of Appeals No. 318680

PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S *PRO PER* APPLICATION FOR LEAVE TO APPEAL

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Counterstatement of Jurisdiction

The People accept and adopt defendant's statement of jurisdiction.

Counterstatement of Issue Presented

I.

Defendant must be provided notice of an enhanced sentence within 21 days of the arraignment on the information. In this case, written notice of the enhancement was filed when defendant was first charged and the enhancement notice was then read to defendant on the record at the arraignment on the warrant. Was defendant provided timely notice of the enhancement?

The Court of Appeals answered, "Yes."
The trial court answered, "Yes."
The People answer: "Yes."
Defendant answers: "No."

Counterstatement of Facts

On September 6, 2013, defendant was convicted via jury trial before the Honorable Timothy Kenny of first-degree home invasion and unarmed robbery.[1] He was sentenced within the guidelines as a habitual-third offender on September 23, 2013, to two concurrent terms of 12-40 years in prison. [2] He filed a motion for resentencing on February 28, 2014, arguing that he was not provided the proper notice of his sentence enhancement. Judge Kenny rejected his motion, holding that the People had complied with the notice requirement and defendant was, in fact, on notice of the habitual-third enhancement.[3]

Defendant then appealed to the Court of Appeals, arguing (1) that he was entitled to resentencing because he did not receive proper notice of the third-habitual-offender notice, and (2) that he was denied the right to present a defendant because of an evidentiary decision made by the court. The Court of Appeals affirmed defendant's convictions, holding that defendant had actual knowledge of the prosecutor's intent to seek an enhanced sentence, and—to the extent that defendant argued that there was no proof of service as required by MCL 769.13(2)—any such

[1]MCL 750.110a(2); MCL 750.530.

[2]References to the trial record are cited by the date of the hearing followed by the page number; 9/23, 15.

[3]2/28, 6-7.

error was harmless because the defendant was nevertheless provided notice and never objected at sentencing to being sentenced as a third habitual offender. The Court of Appeals also rejected defendant's evidentiary challenge.

Defendant then filed an application for leave to appeal with this Court. This Court, in turn, issued an order directing the People to answer the application. "In particular, we direct the prosecutor to respond to the question whether the defendant or his attorney was personally served with a copy of the information containing the habitual offender notice at the arraignment. If not, the prosecutor is directed to explain when and how the habitual offender notice was served on the defendant or his attorney." This answer ensues. Additional facts will be presented *infra* in the Argument section of this brief.

Argument

I.

Defendant must be provided notice of an enhanced sentence within 21 days of the arraignment on the information. In this case, written notice of the enhancement was filed when defendant was first charged and the enhancement notice was then read to defendant on the record at the arraignment on the warrant. Defendant was provided timely notice of the enhancement.

Standard of Review

Whether the prosecutor fulfilled the statutory requirements of the habitual offender statute, MCL 769.13, poses a question of law, which this Court reviews *de novo*.[4]

Discussion

There is little question on this record that defendant was provided actual notice of the habitual-third enhancement in a timely fashion, as the initial complaint and information (which were signed and filed the day before the arraignment on the warrant) contained the required notice, defendant was read the information containing the notice at the arraignment on the warrant, and defendant specifically acknowledged *on the record* that he heard he was being charged as a habitual-third offender.

[4]See *People v Hornsby*, 251 Mich App 462, 469 (2002).

Because defendant received actual notice of the enhancement far in advance of the statutory deadline, the Court of Appeals did not err in affirming his sentence, and this Court should deny his application for leave to appeal.

Under MCL 769.13(1), written notice of an enhanced sentence must be filed within 21 days after the defendant's arraignment on the information or, if the arraignment is waived, within 21 days of the filing of the information.[5] MCL 769.13(2) goes on to state:

> A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for serve of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.[6]

The purpose of this notice requirement "is to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused

[5]MCL 769.13(1).

[6]MCR 769.13(2).

be convicted of the underlying offense."[7] The Court of Appeals in *People v Morales* described the 21-day-rule as a "a bright-line test" to ensure that the prosecutor files the notice promptly, thereby making sure there are adequate procedural safeguards in place to protect defendant's due process rights.[8]

But—while the notice requirement must be strictly complied with to assure the defendant has notice of the enhancement within the specified time—the same is not true when there is merely a failure to file a proof of service with the lower court. For example, in *People v Walker*, the defendant claimed that his due process rights were violated because the lower court file did not contain a proof of service of its notice to enhance defendant's sentence.[9] The Court of Appeals held that—even assuming that the prosecution failed to file the proof of service, as opposed to the alternative explanation that the trial court clerk failed to place it in the file—reversal was not warranted because any potential error was harmless beyond a reasonable doubt. Where it was clear the defendant received the notice despite the lack of proof of service, the court held that the defendant was not prejudiced in any way.[10]

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[7] *People v Morales*, 240 Mich App 571, 582 (2000), quoting *People v Shelton*, 412 Mich 565, 699 (1982).

[8] *Morales*, 240 Mich App at 582.

[9] *People v Walker*, 234 Mich App 299, 314-315 (1999).

[10] *Id.*

In this case, MCL 769.13(1) was complied with because written notice was filed on May 24, 2013, well over a month before the prosecutor's deadline to file notice in compliance with the statute.[11] On May 24, 2013, the felony warrant and felony complaint—both containing the habitual-third offender notice—were signed by the charging prosecutor, the investigator, and the magistrate before being filed with the district court.[12] The felony complaint contained a written notice of the prosecutor's intent to seek a sentence enhancement and included a listing of defendant's prior convictions on which the prosecution intended to rely in seeking sentencing enhancement. Written notice was also provided in an unsigned copy of the felony information dated May 24, 2013.[13] Because written notice was filed well in advance of the statutory deadline, the prosecutor complied MCL 769.13(1).

Likewise, the written notice was filed with both the district court and circuit court, fulfilling the initial requirement of MCL 769.13(2). As noted above, written

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[11]While the statute requires that the notice be filed within 21 days after arraignment or after the filing of the information if the defendant is not arraigned, that does not mean that a notice filed before arraignment is invalid. See *People v Marshall*, 298 Mich App 607, 627 (2012), vacated in part on other grounds 493 Mich 1020 (2013) (in a case in which the defendant was not arraigned on the information, the court held that the habitual offender notice was timely because it was included in the charging documents and information from the inception of the case).

[12]The felony complaint and felony information dated May 24, 2013, are attached as Appendix A.

[13]The prosecutor also later filed a signed, amended felony information on September 3, 2013, which merely changed the weapon used during the armed robbery from a gun to "a gun and/or vase." The information contained in the habitual notice remains the same. It is attached as Appendix B.

notice of the enhancement was contained in the felony information, warrant, and complaint, which were filed on May 24, 2013. Consistent with that, the lower court register of actions states that defendant was charged as a habitual offender on May 24, 2013. After defendant was arraigned on the warrant and bound over, the bindover packet—which contained, among other things, copies of the felony information and complaint—was then filed with the circuit court. The circuit court record, in turn, contains multiple copies of the relevant documents. Accordingly, copies of the written notice of enhancement were filed with both the district court and the circuit court in compliance with subsection (2).

Despite the fact that written notice of the enhancement was timely filed, defendant nevertheless argues in his application for leave to appeal that he was not provided any notice whatsoever before trial. Specifically, defendant states that he "was never notified in writing or any other way that he was being charged with a 3rd habitual offense" until after sentencing. This claim is completely belied by the record in this case.

On May 25, 2013—the day after he was charged and written notice of the habitual notice was filed with the court—defendant was arraigned on the warrant. At that arraignment, defendant was read the charges and penalties, *including the habitual offender third notice*. He stated that he heard the charges. Specifically:

The Clerk:	Thank you, case number 13-58994. The People of the State of Michigan versus Phillip Joseph Swift. The Defendant is charged with Count one, Armed Robbery. The penalty is life. Count two, Home Invasion First Degree. The penalty is 20 years and/or five thousand dollars. Count three, Unarmed Robbery. The penalty is 15 years, DNA is to be taken upon arrest. Count four, Firearm Weapons discharged in or at a building. The penalty is 4 years and/or two thousand dollars mandatory forfeiture of weapons or device. Count number five, Felony Firearm Weapons. The penalty is two years. *The Defendant has a second offense notice also a habitual third offense notice. The defendant is present.*
The Court:	Sir, state your name.
The Defendant:	Phillip Joseph Swift.
The Court:	And you heard the charges that were read and the penalties that you could receive?
The Defendant:	Yes.[14]

A preliminary exam date was then set and defendant was informed that he had a right to remain silent and a right to an appointed attorney if he could not afford one. He stated that he understood those rights.[15]

[14]5/25/13, 3 (emphasis added). This transcript is attached as Appendix C.

[15]Id at 4.

The preliminary examination was then held on June 6, 2013, where defendant was represented by counsel. Defense counsel not only did not object to not having a copy of the information, but the parties discussed amending the information to change the language in count one from "a gun" to "a gun and/or vase" based on the testimony.[16] Defendant was bound over. On June 13, 2013, before the Honorable Timothy Kenny, the arraignment on the information took place. At the arraignment, defendant chose to waive the formal reading of the information as is permitted under MCR 6.113(B),[17] signaling that he did not need it read to him because he already had a copy of the information.[18]

Defendant was eventually tried via jury trial and convicted. At the sentencing on September 23, 2013, he was sentenced as a habitual-third offender, pursuant to the enhancement notice filed the day he was charged. The prosecutor then stated defendant's guidelines as a habitual-third offender, which were 84-210 months.

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[16]6/6, 29. It does not appear that the change to the information was actually made until the prosecutor filed an amended information on September 3, 2013.

[17]6/13, 3. The lower court file contains several copies of the information, indicating that the information was filed with the court. Likewise, every single copy of the information from the date defendant was charged until the present lists the exact same habitual-third notice.

[18]See generally *People v Henry (After Remand)*, 205 Mich App 127, 159 (2014)(holding that the trial court did not lack subject-matter jurisdiction after defendant signed a waiver of arraignment before the filing of the information because defendant was nevertheless aware of the charges against him even though the trial court did not hold an arraignment); *People v Nix*, 301 Mich App 195 (2013)("A showing of prejudice is required to merit relief for the failure to hold a circuit court arraignment.").

Counsel not only did not object, but informed the court that sentencing him as a habitual offender was discretionary.[19] Given this record, defendant's claim that he was not provided any notice whatsoever until after sentencing when he was already in prison is false.

Defendant's best argument—which he does not actually make in his application—is that there is no record that the prosecutor strictly complied with the last sentence of MCL 769.13(2), which requires the prosecutor to file a written proof of service indicating that he or she personally served defendant or his attorney with the notice. But—while the prosecutor may or may not have filed a written proof of service with the court clerk[20]—any potential failure to strictly comply with the latter half of MCL 769.13(2) was harmless because, as mentioned above, defendant had actual notice of the sentence enhancement and there is no indication that defendant was prejudiced in any way even if written proof of service was not filed.

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[19]9/23, 11. Defendant was sentenced to a minimum of 12 years, which is 144 months. Id at 15. Had defendant not been a habitual offender, his guidelines would have been 84-140. As a second-habitual offender, they would have been 84-175. And as a habitual-third offender, they were 84-210 months. In other words, he was sentenced just four months above what he would have been sentenced with no habitual enhancement.

[20]The People do not concede that the prosecutor failed to file a written proof of service with the court clerk. We acknowledge, however, that there is no copy of the proof of service contained in the court file and, thus, no way to prove that a proof of service was filed.

As mentioned *supra*, the lack of proof of service can constitute harmless error when the notice has been timely filed and defendant has actual notice of the sentence enhancement.[21] The primary purpose of the 21-day period in MCL 769.13 is to provide a defendant notice of the enhancement; therefore, where a defendant has actual notice of the prosecution's intent to charge him as an habitual offender, any error in failing to file a proof of service with the court is harmless.[22] This is consistent with the general rule that failures to comply with precise procedure requirements

[21] *People v Walker*, *supra*, 234 Mich App at 314-315. The language of MCR 6.112 ("The Information or Indictment") does not change the harmless-error analysis. Specifically, MCR 6.112(F) states that the notice to seek an enhanced sentence must list the prior convictions and be filed within 21 days after the defendant's arraignment on the information, etc. MCR 6.112(G) states that, absent a timely objection and a showing of prejudice, a court may not dismiss an information because of errors in the information. It goes on to say that the harmless-error standard "does not apply to the untimely filing of a notice of intent to seek an enhanced sentence." Here, there is no question that the enhancement notice was filed in a timely fashion. MCR 6.112(F) or (G) says nothing regarding the proof-of-service issue present in the instant case.

[22] *Walker*, 234 Mich App at 314–315.

should not result in automatic reversal,[23] particularly where a party alleging lack of written notice did, in fact, have actual notice.[24]

Here, even if there was an oversight in filing a proof of service with the court, any such error was harmless. In addition to the charging documents clearly listing the habitual notice, defendant was actually read the notice on the record at the arraignment on the warrant and acknowledged the he heard the information being read. Further, there is absolutely no indication in the record that defense counsel did not have a copy of the information or that he was in any way surprised when defendant was sentenced as a habitual-third offender. To the contrary, counsel never objected to lack of notice or the habitual-third enhancement either at the district court or circuit court level.[25]

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[23]See e.g. *People v Cook*, 285 Mich App 420 (2009)(holding that a trial court's failure to strictly comply MCR 6.402(B) is harmless where the record establishes that defendant nevertheless understood that he had a right to a trial by jury and voluntarily chose to waive that right); *People v Plumaj*, 284 Mich App 645, 649 (2009); *People v Saffold*, 465 Mich 268, 273-281 (2001)(holding, in the context of guilty pleas, that the trial court's failure to strictly comply with MCR 6.302 does not require automatic reversal where there is substantial compliance and the record as a whole reveals that the guilty plea was made knowingly and voluntarily); *People v Lane*, 453 Mich 132, 139 (1996)(holding that, where the trial court failed to advise the defendant regarding his right to counsel at the sentencing hearing, the error was harmless because defendant did not allege that it prejudiced him in any way).

[24]*Walker*, *supra*, 234 Mich App at 314-315.

[25]Likewise, defendant makes no argument that he could have or would have challenged any of the convictions listed in the information making up the habitual notice. He makes no argument that he was prejudiced in any way by the fact that there is no proof of service contained in the file.

Ultimately, the People fulfilled the notice requirement of MCL 769.13(1) and any error in not strictly complying with the last sentence of MCL 769.13(2) was harmless because defendant was provided actual notice of the enhancement. Accordingly, the Court of Appeals correctly denied defendant's request for resentencing and this Could should, in turn, deny defendant's application for leave to appeal.

Relief

THEREFORE, the People ask this Honorable Court to deny defendant's application for leave to appeal.

Respectfully submitted,

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June 29, 2016